



STATE OF CONNECTICUT

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Draft Advisory Opinion No. 2012-3

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Question Presented: **The petitioner asks whether two former employees of the Department of Labor may be retained by their former state agency as consultants through a vendor contract within the first year after their retirement from state service, without violating General Statutes § 1-84b (b).**

Brief Answer: **No. Section 1-84b (b) prohibits the former employees of the Department of Labor from being retained by their former state agency as consultants through a vendor contract within the first year after their retirement from state service.**

At its December 2011 regular meeting, the Citizen's Ethics Advisory Board ("Board") granted the petition for an advisory opinion submitted by Dennis C. Murphy, Deputy Commissioner of the Connecticut Department of Labor. The Board issues this advisory opinion on the date shown below in accordance with General Statutes § 1-81 (a) (3). The opinion interprets the Code of Ethics for Public Officials ("Ethics Code")¹ and its regulations, is binding on the Board concerning the person who requested it and who acted in good-faith

¹Chapter 10, part I, of the General Statutes.

reliance thereon, and is based solely on the facts provided by the petitioner.

Facts

The pertinent facts provided by the petitioner are set forth below and are considered part of this opinion:

DOL experienced a number of retirements by essential Information Technology (“IT”) staff on October 1, 2011. Due to the unexpected nature of these retirements and the understaffing of the IT unit, DOL has not had the time, opportunity or resources to fully train other staff members in the areas in which the retirees specialize. While several retirees were able to be brought back to work at the agency as “temporary worker retirees” pursuant to state policy, two retirees are prohibited from returning in such capacity. The retirees were employed as an IT Supervisor and an IT Analyst III. These two retirees elected early retirement pursuant to an irrevocable agreement, which provides that they are prohibited from returning to state service in any capacity, including pursuant to the temporary worker retirees policy. As a result, the only way to procure their services would be to hire them as consultants through the IT Professional Services Contract . . . administered by the Department of Administrative Services (DAS).

Procuring the two former employees’ services as consultants through the DAS IT Professional Services Contract requires that DOL provide to the vendor a request for services, the vendor would then submit résumés of its consultants that matched the agency’s needs, enabling DOL to then select consultants from the list provided and pay their consulting fee through the vendor.

DOL has a significant number of IT projects that are currently staffed with consultants procured through the

DAS IT Professional Services Contract, rather than through individual contracts with vendors. . . .²

Analysis

As former “state employees” at the DOL, the retirees are subject to four of the Ethics Code’s post-state employment provisions—General Statutes §§ 1-84a, 1-84b (a), 1-84b (b), and 1-84b (f)—only one of which is in dispute here, namely, § 1-84b (b), which reads in relevant part as follows:

No former executive branch . . . state employee shall, for one year after leaving state service, represent anyone, other than the state, for compensation before the department . . . in which he served at the time of his termination of service, concerning any matter in which the state has a substantial interest. . . .

Section 1-84b (b) was intended to prevent state employees from “using contacts and influence gained during state service to obtain an improper advantage in their subsequent compensated dealings with their former agency.”³ Its restriction is “aimed at contact with the former agency, since any contact could result in preferential treatment by virtue of the individual’s former status.”⁴ It is therefore irrelevant whether the matter “involved is one with which the individual had contact as a public employee,” for the “undue influence guarded against is that which results from mere association with the former agency. A cooling period . . . combats the exertion of undue influence, since that influence tends to fade with time.”⁵

With § 1-84b (b)’s language and purpose in mind, we turn to the issue at hand, which, in the petitioner’s words, is this: Whether the DOL may retain two of its retirees “as consultants through a vendor

²Petition for Advisory Opinion submitted by Dennis Murphy to the Citizen’s Ethics Advisory Board (November 29, 2011) (hereinafter, Advisory Opinion Petition).

³(Internal quotation marks omitted.) Advisory Opinion No. 2007-10, Connecticut Law Journal, Vol. 69, No. 11, p. 9E (September 11, 2007).

⁴(Internal quotation marks omitted.) Advisory Opinion No. 2010-4, Connecticut Law Journal, Vol. 72, No. 7, pp. 8D-9D (August 17, 2010).

⁵(Internal quotation marks omitted.) *Id.*, p. 9D.

contract within the first year after their retirement from state service,”⁶ without violating § 1-84b (b), under which (again) the DOL retirees may not do as follows:

- (1) represent
- (2) anyone, other than the state,
- (3) for compensation
- (4) before the department in which they served at the time of their termination of service,
- (5) concerning any matter in which the state has a substantial interest.

Starting with the word “represent,” the former State Ethics Commission (“SEC”) defined it, for purposes of § 1-84b (b), to mean “any activity which reveals the identity of the former employee to his former agency.”⁷ Activities deemed to fall within that definition include, for example, “making a personal appearance or phone call, being designated on a firm’s letterhead, or submitting a document on which the former State employee’s name appears.”⁸ Here, because the vendor would have to submit documents to the DOL on which the retirees’ names appear (i.e., their résumés), the “represent” component in § 1-84b (b) is satisfied.

Turning to § 1-84b (b)’s other four components, the retirees’ representation would be on behalf of someone other than the state (i.e., the vendor); it would involve compensation; it would be before the department in which they served at the time of their termination of state service (i.e., the DOL); and it would concern a matter in which the state has a “substantial interest”⁹ (i.e., the agency’s IT projects).

⁶Advisory Opinion Petition.

⁷Advisory Opinion No. 98-21, Connecticut Law Journal, Vol. 60, No. 10, p. 5C (September 8, 1998).

⁸(Internal quotation marks omitted.) Connecticut Law Journal, Vol. 72, No. 7, *supra*, p. 10D.

⁹“The state has a substantial interest in a matter whenever the finances, health, safety, or welfare of the State or one or more of its citizens will be

Accordingly, each of the provision's five components is met, meaning that the proposed consulting arrangement is prohibited by the plain language of § 1-84b (b).

The same result was reached when the SEC addressed an almost identical fact set in Advisory Opinion No. 98-21. In that opinion, the Department of Information Technology ("DOIT") sought to retain the services of some of its retirees for various IT projects.¹⁰ For administrative reasons, however, it could do so only if the retirees were to "affiliate as consultants with private sector firms which are on the Data Processing Consulting Services Award Contract administered by DOIT."¹¹ The mechanics of the contract-award system were as follows:

[T]he State has established lists of approved data processing vendors for various job categories . . . with the vendors' accompanying daily rates for the services in question. Agencies with the need for data processing consulting work submit their projects to DOIT. Each project is compared to the job classifications established under the Contract Award, and the agency is assigned the appropriate category of consultants. The agency is then allowed to contact the vendors on its list for the purpose of receiving resumes of available consultants. Agencies are expected to contact vendors in order, commencing with the lowest per diem rate. Based on those resumes, and subsequent interviews, the agency selects an appropriate vendor and submits a request for services to DOIT for final approval.¹²

Addressing whether "this vendor affiliation is an appropriate means . . . for continuing the retirees' work for the State,"¹³ the SEC responded that it was not.¹⁴ In doing so, it discussed an exception to § 1-84b (b)'s one-year ban on representing "anyone" before one's former

substantively affected by the outcome." Advisory Opinion No. 96-6, Connecticut Law Journal, Vol. 57, No. 42, p. 1D (April 16, 1996).

¹⁰Connecticut Law Journal, Vol. 60, No. 10, *supra*, p. 3C.

¹¹*Id.*

¹²*Id.*, p. 4C.

¹³*Id.*, p. 3C.

¹⁴*Id.*, p. 4C.

agency.¹⁵ Established in Advisory Opinion No. 89-25 (Amended), the exception allows, with certain caveats, a former state employee to represent himself before his former agency within a year of leaving state service for the purpose of entering into a consulting agreement.¹⁶ But this exception, said the SEC, “clearly contemplated a direct consultant relationship between the State as payor and the former employee as payee”¹⁷—not a scenario in which “the former employee is representing a vendor before his former state agency and the State is paying the vendor”¹⁸ The latter scenario, it concluded, represents a head-on violation of § 1-84b (b).¹⁹

The same must be said of the scenario before us, for the facts here practically mirror the facts there. That is, to procure the services of the DOL retirees, the DOL must “hire them as consultants through the IT Professional Services Contract,” under which the DOL must submit a request for services to a vendor, which responds by submitting its consultants’ résumés to the DOL, which ultimately “select[s] consultants from the list and pay[s] their consulting fee through the vendor.”²⁰ As in Advisory Opinion No. 98-21, there is no “direct consultant relationship between the State as payor and the former employee[s] as payee[s],”²¹ but a scenario in which a vendor serves as an intermediary, facilitating the arrangement by, for example, submitting the retirees’ résumés and receiving payment from the State. A like conclusion therefore must follow, namely, that § 1-84b (b) prohibits the proposed consulting arrangement.

The petitioner disagrees, arguing that the proposed consulting arrangement is permissible under a second exception to § 1-84b (b) that was discussed in Advisory Opinion No. 2003-3. The exception, as articulated in that opinion, provides as follows:

¹⁵Id., p. 4C.

¹⁶Id. This exception was designed to allow state agencies to use a former employee’s expertise and, simultaneously, to prevent the former employees from using their agency contacts or influence to negotiate an enhanced pay rate. Id.

¹⁷Id.

¹⁸Id.

¹⁹Id.

²⁰Advisory Opinion Petition.

²¹Connecticut Law Journal, Vol. 60, No. 10, *supra*, p. 4C.

[A] former state employee who was not involved in the negotiation or award of the private employer's contract with the state agency, and who has been and will continue to perform only technical duties that involve no matters of actual or potential dispute between his new employer and the state agency, may accept employment with the outside contractor to work on implementation of the existing contract, without violating . . . § 1-84b . . . (b).²²

Although at first blush this exception may seem to support the petitioner's position, a close examination of its origins belies his argument (as does the fact that, in Advisory Opinion No. 98-21, the SEC did not even bother to mention the exception, which had been in existence for ten years at that point).

This exception was established in Advisory Opinion No. 88-15,²³ and its focus is entirely upon discretionary authority. It involved an employee of the Office of Policy and Management ("OPM") who wanted to accept post-state employment with a private firm that had been awarded a multi-million-dollar state contract for a specific project (i.e., the design, development, and implementation of an Automated Budget System and a Capital Budget System).²⁴ Having worked on the project while in state service, the OPM employee asked whether, after leaving her state job, she could continue to engage in "technical work" on the project as an employee of the firm.²⁵ Although recognizing that her work on the firm's behalf concerning the project would bring her into contact with OPM within § 1-84b (b)'s one-year prohibited period, the SEC approved the arrangement, stating:

In the past, the Commission has applied the restriction[] of [§ 1-84b (b)] in situations where the representation concerned contract awards, contested cases, and applications for permits. . . . *In essence, all these matters*

²²Advisory Opinion No. 2003-3, Connecticut Law Journal, Vol. 64, No. 36, pp. 5D-6D (March 4, 2003).

²³Advisory Opinion No. 88-15, Connecticut Law Journal, Vol. 50, No. 15, (October 11, 1988).

²⁴Id., p. 3D.

²⁵Id.

involved the exercise of discretionary authority by the State.

. . . It does not seem necessary, or fair, to extend these restrictions to a former State employee performing only technical duties that involve no matters at issue between the State . . . and her Firm. For such activities offer no opportunity for use of improper advantage.²⁶

The situation before us is demonstrably different. There, OPM had already entered into a contract with the firm to work on a specific project, and the firm's hiring of the former OPM employee, and her technical work on the firm's behalf, involved no discretionary authority on OPM's part. Here, in contrast, the DOL's IT projects are "staffed with consultants procured through the DAS IT Professional Services Contract, *rather than through individual contracts with vendors.*"²⁷ And to obtain the consultants' services, the DOL must submit a request for services to the vendors and then "*select consultants from the list provided and pay their consulting fee through the vendor.*"²⁸ In selecting consultants, the DOL is exercising discretionary authority, thus offering the opportunity for the use of improper advantage, which is precisely what § 1-84b (b) was designed to prevent. Therefore, at least one aspect of the exception—the lack of opportunity for the agency to exercise discretionary authority—is not present here.

Having determined that none of the exceptions to § 1-84b (b) apply to the facts at hand, we must conclude that the provision's general rule stands, meaning that the DOL retirees may not be hired as consultants through the vendor contract within the first year after their retirement from state service.

By order of the Board,

Dated _____

Chairperson

²⁶(Emphasis added.) Id., p. 4D.

²⁷(Emphasis added.) Advisory Opinion Petition.

²⁸(Emphasis added.) Id.